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Offshore outsourcing and worker rights

By Theodore J. St. Antoine



The following essay is based on the author's keynote address to the annual meeting of the Labor and Employment Law Section of the California State Bar in fall 2005. A version appeared in the September 2005 issue of California Labor and Employment Law Review and appears here with permission of the Labor and Employment Law Section of the State Bar of California.

For the workers in the Rust Belt of the United States, concentrated in Southern New England, Western New York State, Pennsylvania, Ohio, Michigan, Indiana, and Illinois, it doesn't make much difference whether their jobs are outsourced or lost to North Carolina or Mexico or China. In any event the sources of income that have existed for generations are gone and the economic and psychic pains are much the same. Nonetheless, for purposes of national policy it plainly matters whether the work is moving to another part of the country or is leaving the United States entirely. I am going to focus on what has become a growing concern everywhere in this country—the flight of jobs abroad as business seeks the advantages of dramatically lower wage scales. That is known as offshore outsourcing or contracting.

Domestic labor law will have little if any effect on this process. *Dubuque Packing Co.* [303 N.L.R.B. 386 (1991), enforced *sub nom. Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993)] may require an employer to bargain with a union representing its workers about the relocation of operations. But that obligation does not apply in various circumstances, for example, if there is a basic change in the nature of the employer's operations or if the union would not have offered labor cost concessions that could have changed the employer's decision to relocate. And if the employer must negotiate, a study I have made indicates that the duty to bargain can be fulfilled on the average in a mere four to six weeks. So, even if we assume *Dubuque* would be applicable, it is not going to constitute a significant barrier to offshore outsourcing. Similarly, the Worker Adjustment and Retraining Notification (WARN) Act of 2002, which requires larger employers to notify employees 60 days in advance of mass layoffs, would do no more than impose a modest additional procedural step on a business decision to switch to offshore operations.

Nature of the problem

Everyone seems to recognize that American manufacturing jobs have been hard hit by foreign competition and by the decisions of domestic producers to shift their operations overseas. Seriously affected are such highly visible industries as autos, steel, textiles, and electronics. Less conspicuous until recently is the movement abroad of such service jobs as computer consulting and even medical and legal research and analysis. Despite this, the Department of Labor in its first study of the subject reported that only 2.5 percent of the "major" layoffs (50 workers at one time) in the first quarter of 2004 were the result of jobs going overseas. Far more losses were attributable to automation. Even so, Forrester, an information technology consulting firm, projects the loss in U.S. jobs to offshoring to total around 3 million over the next decade, or about 250,000 layoffs a year. That would be 25 percent of the country's annual layoff rate of 1 million, or considerably more than the Labor Department's estimate.

In terms of global wage differentials, the stark fact confronting American workers is that 1.2 billion persons throughout the world earn less than \$1 a day. In China the average pay rate is about 32 cents an hour (50 cents in manufacturing) in contrast to our \$17 an hour. Of course these raw figures can be deceptive since they do not take into account sharp differences in the cost of living and other variables. The "iron rice bowl," for example, has long been a tradition in China (though it is now being eroded). Under it many Chinese workers have received such nonwage benefits as free food and subsidized housing. But regardless of any of these refinements, wide wage differentials in real dollars in most of the rest of the world will remain for the foreseeable future a major attraction to American business and a daunting challenge to American labor standards. (One recent study suggests that the

labor-cost advantages of offshore outsourcing may be exaggerated. A report released in July 2005 by Ventoro, an outsourcing consulting and market research company, found that only nine percent of cost savings from offshore outsourcing of information technology resulted from lower overseas labor costs. The principal savings came from the quality of the offshore systems and products.

International labor standards

In a keynote speech at a conference on globalization held at the University of Michigan Law School in April 2004, Editor Robert L. Kuttner pointed out that all the advanced economies in today's world have evolved into what can fairly be described as *mixed* economies. While the systems remain basically capitalist, they are tempered by governmental regulation, not only to ensure equity but also to enhance efficiency. Kuttner observed that unconstrained markets erroneously price many essential elements for economic development, including education, health, research, environmental quality, and public governance. The lesson we have learned is that unregulated capitalism is inherently unstable. Thus, in the late 19th and early 20th centuries, the United States proceeded to adopt

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antitrust laws, securities regulation, trade regulation, and labor laws to avert recurrent economic downturns. Kuttner went on to say that international markets, left to themselves, are especially volatile. The recent Southeast Asian financial crisis is an example. Kuttner then asked the provocative question: "By what alchemy does the market system, which is not optimal as *laissez-faire* within nations, somehow become optimal as *laissez-faire* between or among nations?"

In 1998 the International Labor Organization (ILO) made something of an effort to counter this *laissez-faire* philosophy by securing the unanimous commitment of its 177 member

nations to four "core" labor standards. As spelled out in the ILO's Declaration on Rights at Work, they are:

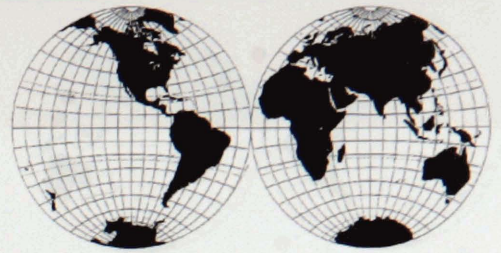
- freedom of association and the right to collective bargaining;
- elimination of all forms of forced or compulsory labor;
- abolition of child labor; and
- elimination of employment and occupational discrimination.

That is a noble set of standards but it suffers from at least two major deficiencies. First, it omits any provision regarding labor costs—a minimum or living wage. That of course would not mean a single worldwide minimum pay rate but rather one that took into account the variations in living costs and subsistence needs from country to country. Second, the core set fails to provide for effective enforcement. The ILO can appeal to the conscience of the world, but that is often a weak reed against the lure of seeming economic advantage. The World Trade Organization (WTO) has a variety of trade sanctions it can impose against the violators of trading or *property* rights, but the ILO has no counterpart in dealing with violations of worker or *human* rights.

For me and many others, the first basis for recognizing international labor rights is a moral one. They are inherent in the dignity and worth of the individual human being. That is the same rationale as the rationale for the Universal Declaration of Human Rights, vigorously promoted by the United States and adopted by the United Nations in 1948. The Universal Declaration itself spells out a number of labor rights, including the "core" rights of nondiscrimination in employment, the right to form labor organizations, and the prohibition of slavery and child labor.

Despite these grand pronouncements on international human rights, I am skeptical enough about human motivations to fear that moral grounds, however exalted and appealing in the abstract, will not be sufficient to carry the day in the market place. Ultimately, I believe that an *economic* justification will be needed to rally support for an enforceable set of globally recognized worker rights. Here a principal champion has been Ray Marshall, former U.S. Secretary of Labor and now professor of economics at the University of Texas.

In several books and articles, Professor Marshall has argued that the establishment and enforcement of labor standards are



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key components of a high-skilled, high-wage, and value-added development strategy that promotes productivity and economic stability. The prosperity of the United States in the post-World War II era is cited as a prime example of this phenomenon. Collective bargaining and minimum wage laws sustained aggregate consumer demand and that in turn spurred solid economic growth. By contrast, countries that rely on low wages instead of skills development to attract investment will find restless investors moving elsewhere whenever they discover areas with still-lower wages. In the absence of international labor standards, however, the temptation for many countries will be irresistible to resort to the lure of low-wage costs to attract business and investment. The race to the bottom would be in full flight. In addition to offsetting that race to the bottom, internationally generated standards would have the advantage of allaying the fears of developing countries that the specified labor standards were simply a disguised exercise in protectionism on the part of the richest, most economically advanced nations.

Perhaps the crucial element would be a realistic set of mandatory minimum wage levels. There obviously could not be a single universal standard. The requirements would have to reflect the current wide variations in living standards and economic conditions throughout the world. At least a fair subsistence wage should cover the basic needs of a family, including food, shelter, clothing, health care, education, and transportation. The European Social Charter calls for the member countries of the European Union to ensure all workers a "decent standard of living." In April 2005 a group of researchers from France, Germany, and Switzerland proposed that implementation of this right should require a minimum pay rate equal to 60 percent of the average national wage.

Developing countries complain that any effort to impose such minima impairs their low-wage comparative advantage. But as Professor Sarah Cleveland has stated: "[I]t is simply disingenuous for countries to dismiss the payment even of subsistence wages as protectionist or infringing on their legitimate low-wage competitive advantages." The line may not always be easy to draw, but surely one exists between a particular economy's appropriate competitive edge and the sheer exploitation of workers.

Enforcement

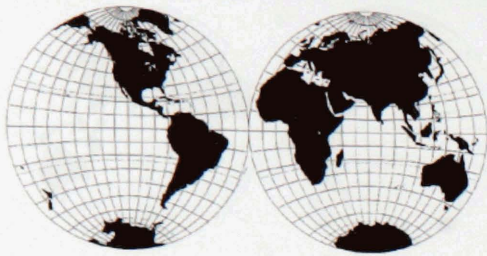
Existing United States domestic law does provide some means of enforcing minimum labor standards abroad. Thus, in the Generalized System of Preferences (1984), Congress required developing countries to comply with "internationally recognized worker rights" in order to qualify for special tariff benefits. And Section 301 of the 1974 Trade Act was amended in 1988 to impose on this country's foreign trading partners the duty to observe "core" human rights. But enforcement of the Trade Act has often been lax, especially with such substantial trading nations as China. Indeed, in today's rapidly expanding and complex global markets, and with the increasing power and business flexibility of multinational corporations, the capacity and willingness of ours or any government to enforce labor standards unilaterally is severely limited. Some system of international enforcement is needed.

As noted earlier, the ILO is the international body charged with promulgating substantive labor standards, and technically they are legally binding on ratifying member states. (All ILO members are bound by the organization's constitution. Individual conventions are binding only on the countries that ratify them. The United States is notorious for the small

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number of conventions we have ratified. We have not even ratified such basic conventions as those guaranteeing freedom of association [ILO Convention 87] and the right to engage in collective bargaining [ILO Convention 98]).

But the ultimate enforcement power of the ILO is practically nil. Its appeal is to a nation's conscience, its national pride and concern about the reputation the country enjoys among the other nations of the world. On the other hand, the World Trade Organization (WTO) does indeed have the authority to impose such sanctions as fines or embargoes on countries that violate



WTO rules by committing unfair trade practices. The ideal, in my mind, would be to have the “core” labor standards that are developed by the ILO become enforceable by the WTO. Violations would constitute unfair trade practices. (Despite the WTO’s rejection to date of trade-labor linkages, the inaugural Singapore Ministerial Declaration in 1996 committed the WTO’s members to observance of “internationally recognized core labor standards” and encouraged the WTO and ILO secretariats to “continue their existing collaboration.”)

Such trade-labor linkage has been heatedly opposed by a variety of interested parties. For free marketers, it amounts to a matter of ideology. Any value other than pure laissez-faire, whether it be labor rights or environmental quality, must be brushed aside as an unjustified and harmful intrusion on global trade. The lessons we have learned about the importance of government regulation of markets within countries are dismissed as inapplicable to the international scene. A second major group resisting any trade-labor linkage consists of the developing countries. They are convinced that any linkage is inherently protectionist and designed to deprive them of their natural low-wage comparative trade advantages.

Protectionist tendencies plainly exist in the richer countries, as exemplified by steel tariffs in the United States and agricultural tariffs elsewhere. But that does not mean that all trade-labor linkage is protectionist. A good part of it is based on a genuine, disinterested concern for the physical and economic well-being of workers worldwide. Moreover, if practically minded scholars like Ray Marshall and Robert Kuttner are right that governmental (or, here, intergovernmental) regulation of the market may enhance rather than impede productive efficiency and promote consumer demand, the most utilitarian grounds also exist for enforcing the ILO’s core labor standards. Such a marriage of morality and enlightened self-interest deserves the support of everyone who wishes to promote both workers’ rights and a stable global economy.

Theodore J. St. Antoine, '54, is a graduate of Fordham College and the University of Michigan Law School. He also spent a year as a Fulbright Scholar at the University of London. He practiced in Cleveland, in the U.S. Army, and for a number of years in Washington, D.C. St. Antoine is known for his writing in the field of labor relations and has engaged in arbitration. He was President of the National Academy of Arbitrators in 1999–2000. He began his academic career at the University of Michigan Law School in 1965 and served as its Dean from 1971 to 1978. He is the James E. and Sarah A. Degan Professor of Law Emeritus. He has also taught as a visitor at Cambridge, Duke, George Washington, and Tokyo Universities, and in Salzburg.

